

**ROGER A. BROWN****Lawyer****38 North Washington Street****Post Office Box 475****Phone (209) 533-7755****Sonoma, California 95370****Fax (209) 533-7757****August 6, 2002*****Sent by fax to 916-322-6440******Original WILL Follow by US Mail*****Chairman Getman and Commissioners Downey, Knox and Swanson****Fair Political Practices Commission****428 J. Street, Suite 450****Sacramento, Ca 95814****RE: In re Hanko (O-02-088)****Dear Madame Chairman and Commissioners:**

This is to provide you with my comments regarding the Draft Opinion prepared by your staff in response to the Opinion Request I filed on behalf of the Peninsula Health Care District. While I disagree with the conclusion reached by the Commission for the reasons stated in my several written and oral presentations, I will not re-argue that position here. Instead, I wish to point out several areas where the Draft Opinion could be improved.

**Caption**

The Peninsula Health Care District is my client and it was on their behalf that I sought this Opinion. Accordingly, my clients would appreciate it if the caption of the Opinion could be changed to state: "Opinion Requested by Peninsula Health Care District." The first paragraph of the Draft Opinion correctly recites these facts and we believe the caption should correspond.

**Question Presented**

I am again concerned about the way the question is posed by the staff for the Opinion. The introduction states that I requested an Opinion on two questions which are then stated in terms I have never used. The "Questions" section of the Opinion does not fairly present the questions I posed. A simple review of the March 28, 2002, letter by which I requested the Opinion shows that the question I posed was as follows:

The basic question is whether Director Hanko must be deemed to have received discretionary "bonus" income from persons or entities other than the actual payor (her employer) where: a) the income is not a commission within the meaning of Regulation 18703(c); b) there is no right to the bonus; and, c) these "other" persons or entities have no control over whether or how much of a bonus she might receive.

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Each time the matter comes before the Commission, the question presented is changed to fit whatever current analysis is being used. If the Opinion is intended to answer the question *I posed*, then it should recite the actual question I asked to be answered. If the Commission proposes to issue an Opinion responding to some other questions, then I would hope there is some explanation why the question is stated differently than the way I originally phrased it.

My request was whether, under the circumstances of this matter, anyone other than Baxter, the actual payor of the bonus income, would be considered a source of income to Director Hanko. I tried to limit the question to the source of income issue to avoid injecting other matters that might divert attention away from this question. Also, it is the source of income question that was most in need of an Opinion since there was staff advice which appeared to conflict with the statute and regulation. I did not ask the Commission to determine whether Director Hanko was disqualified, because once the source of income question was resolved, it would be relatively easy to resolve any disqualification issue.

**Facts Considered**

In footnote 2, page 2, the only facts which appear to have been considered were those in Mr. Colin Coffey's March 15, 2001, letter. If our reading of the footnote is correct, then staff proposes ignoring the facts developed at two public hearings on this Opinion Request. Director Hanko appeared and testified on June 7, 2002, and filed a written response for consideration at the July 11, 2002, public hearing. Additional facts were provided in my submission to the Commission dated July 9, 2002, and each of these facts was confirmed with Director Hanko before the letter was submitted. Surely the additional facts raised in these presentations should also be considered, especially if there are any such facts which are in conflict with the conclusions and analysis offered by staff in the Draft Opinion.

**Misstatement of Fact**

Footnote 3 of the Draft Opinion on page 4, states that Director Hanko "declined to provide" information concerning the amount of her incentive compensation attributable to MPHS for the year 2001. It would be more accurate to say that Director Hanko did not have this information to provide because she did not yet have final compensation figures from Baxter for the year 2001 and she had not done the calculations, estimates and other work necessary to provide the information requested. Director Hanko did not "decline" to provide the information because she cannot provide what she does not have.

**Incentive Compensation**

We believe the Draft Opinion will create more problems than it will solve. For example, an entirely new term of art is proposed for adoption in the Draft Opinion. The staff proposes creating a concept they call "incentive compensation" which they say, "expressly excludes salary." I presume that definition is intended to overcome Commissioner Knox's concerns that the analysis to date would make remote customers sources of salary income as well as bonus income. This concept is untested, has no precedent that we can find, and will undoubtedly spawn additional problems and questions not presently before the Commission. I believe the creation of new terms of art should be done, if at all, by the legislature or by the Commission in its full rule making process, not in an Opinion such as this.

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#### How Many Levels Must an Official Look?

The Draft Opinion also fails to give any guidance on how many levels removed from the actual payor, the public official must look in an effort to find a potentially disqualifying source of income. As we have noted here, MPHS is three steps removed from the public official, but the Draft Opinion has no limitation on how many additional steps a public official might be required to search for another potentially disqualifying source of income. It would be helpful to public officials and agency counsel in the future to put some outer limit on how far one must look.

#### When Is The Income Deemed To Have Been Received?

The Draft Opinion likewise fails to inform us at what point a source like MPHS will be deemed to have triggered the potential for disqualification. Is it when the official receives an amount attributable to the source which exceeds \$500, whether or not the public official has knowledge of this fact? Will it be the date on which the public official learns of the fact and amount of the payments attributable to the source? In Director Hanko's case, will it be the time when Baxter finally confirms the final bonus amount and formula? This is important to determine when, if ever, an official must begin to disqualify herself from decisions affecting the source of income.

#### Is "Incentive Compensation" Income Reportable?

The Draft Opinion defers the question of whether the source of "incentive compensation" must be disclosed on the public official's statement of economic interests. At the last public hearing on this Opinion request, staff attorney Wallace said that Director Hanko is not required to report MPHS as a source of income on her statement of economic interests. In footnote 5 of the Draft Opinion, staff states that the "Commission does not here decide the impact of this Opinion on the disclosure requirements of section 87207."

Unfortunately, the public officials of this state do not have the same luxury. Public officials must decide whether to disclose sources and amounts of income under penalty of perjury. If the Commission concludes that MPHS is a source of income under a new doctrine of "incentive compensation" then they must also tell Director Hanko and others similarly situated whether this source of income is reportable. Without some legitimate and authorized exception, all sources of income are reportable, and sources of "incentive compensation" would be no different.

Failing to decide this question puts public officials in a "never-never land" where they know someone is a source of income but they are left to wonder whether to report them as such. This is not the same as publishing an opinion stating that MPHS is not reportable because the question remains open under the Draft Opinion and Director Hanko runs the risk that some member of the public might file suit against her for failing to report this or other remote customers as sources of income. It is simply not fair to Director Hanko and others to resolve half the question but not the remaining disclosure problems thereby created.

#### Attorneys Will Still Be Included

The Draft Opinion still does not prevent application of the new rules to attorneys who receive bonus income from their firms based in part on their marketing activities. Law firms reward the

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attorneys who are successful in marketing and they even have a term for it: "Rainmaking." Such attorneys are employed (at least in part) to purposefully direct marketing activity toward purchasers of their legal services, there is direct contact between lawyer and client and there is often a direct relationship between the amount of revenue generated from such clients and the amount of bonus the attorney receives. If the Commission wished to fashion a rule which excludes attorneys, this one will not do it.

Confirm or Disaffirm Past Advice Directly

Finally, I believe the Commission should be more direct in its analysis of prior staff advice. If prior advice letters were in error, then the Opinion should state what was erroneous and forthrightly disaffirm them. This is especially necessary if the public officials in question have been disqualifying themselves for over a decade (see Larsen Advice Letter, No. I-89-555) in reliance on staff advice that the Commission now concludes was erroneous.

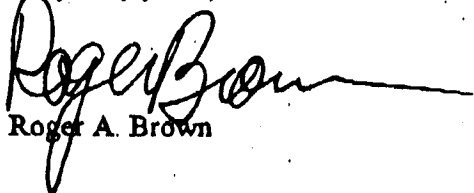
In my previous submissions to the Commission and staff, I have stated what I believed to be the flaws in the analysis in the letters previously relied upon by staff. If the Commission has concluded that the *right to receive* a bonus and the remote *customer's control* over the fact or amount of the bonus are not relevant to the analysis, then this conclusion should be clearly stated in the Opinion. Otherwise, there will always be a question whether this old and now disfavored analysis has any vitality.

Conclusion

I sympathize with the difficulty the staff and Commissioners have had in formulating a reasoned decision and analysis of these very difficult problems. My fear is that this Opinion will not put questions to rest but will, instead, create a host of new questions and problems that will only be more difficult and more complex.

The Peninsula Health Care District and I sincerely thank you for taking the time and effort to consider and weigh the facts and competing policy issues involved in this Opinion request. While we may disagree with your conclusions and with the staff analysis, we respect the difficulty of the task before you and the serious attention you have given to try to resolve these important issues.

Very truly yours,

  
Roger A. Brown

RAB/hs

cc: Colin Coffey